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July 7, 1997

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

HAND DELIVERY

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of MobileMedia Corporation, et al., Applicant  
of Authorizations and Licensee of Certain Stations in  
Various Services, No. 97-115

Dear Mr. Caton:

Delivered herewith for filing are the Motions Of Mark L. Witsaman and Debra P. Hilson For Reconsideration And/Or Clarification Of Paragraphs 17 And 18 Of The Commission's June 6, 1997 Order, Or, In The Alternative, For Other Relief in the above-captioned matter.

We have enclosed an extra copy of each which we would like to have file-stamped and returned via our courier.

Very truly yours,

  
W. Neil Eggleston

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

MOBILEMEDIA CORPORATION, et al. )

Applicant of Authorizations and Licensee )  
of Certain Stations in Various Services )

WT Docket No. 97-115

To: The Commission

**MOTION OF MARK L. WITSAMAN FOR RECONSIDERATION  
AND/OR CLARIFICATION OF PARAGRAPHS 17 AND 18  
OF THE COMMISSION'S JUNE 6, 1997 ORDER, OR,  
IN THE ALTERNATIVE, FOR OTHER RELIEF**

Mark L. Witsaman,<sup>1</sup> by his attorneys, and pursuant to 47 U.S.C. §405 and 47 C.F.R. §1.106, hereby moves for reconsideration and/or clarification of paragraphs 17 and 18 of the Commission's Order of June 6, 1997, or, in the alternative, for other relief. See In the Matter of MobileMedia Corporation, et al., Order, FCC 97-197 (June 6, 1997).

Mr. Witsaman is Senior Vice President and Chief Technology Officer of MobileMedia. As a corporate officer, he has been included on a list issued by the Staff of the Wireless Communications Bureau ("WTB") pursuant to paragraphs 17 and 18 of the June 6 Order. Mr. Witsaman has been substantially and adversely affected by the Commission's Order. Mr. Witsaman seeks reconsideration or clarification of that part

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<sup>1</sup> Undersigned counsel also represents MobileMedia Officer Debra P. Hilson. Ms. Hilson has filed a substantially identical Motion with the Commission.

of the Commission's Order (or other relief) because the Order does not establish an acceptable mechanism for removing an individual from the list.<sup>2</sup>

## **I. THE COMMISSION'S JUNE 6 ORDER**

On June 6, 1997, the Federal Communications Commission issued a stay in the above-referenced proceeding under the Commission's Second Thursday doctrine. In granting the stay, the Commission was concerned that wrongdoers not benefit from the granting of the stay and from any subsequent change in control of MobileMedia.

To address that concern, the Commission directed the creation of a list, which it called "all potential wrongdoers." Defined as belonging on that list were "all former and current officers, directors, and senior managers," regardless of whether the individuals had in fact engaged in any wrongdoing. Order at ¶17. The Commission then stated that to achieve the granting of a Second Thursday petition, MobileMedia must demonstrate these individuals "will have no role in the future operation and management of the company." *Id.* The Commission further ordered that any radio applications in which these named individuals have attributable interests shall not be granted without resolution of this issue. *Id.* at ¶18.

On June 25, 1997, the Bureau issued a "Revised and Corrected List of Former and Current Officers, Directors and Senior Managers of MobileMedia Corp. and Subsidiaries." Mr. Witsaman was included on that list.<sup>3</sup>

## **II. ARGUMENT**

The Commission's June 6 Order has caused and will, if not modified, continue to cause Mr. Witsaman substantial harm. The staff's "Revised and Corrected List of

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<sup>2</sup> Mr. Witsaman seeks limited reconsideration and/or clarification only. He does not seek to have the stay the Commission entered in the June 6 Order lifted.

<sup>3</sup> Prior to the issuance of the list, counsel for Mr. Witsaman sent the staff a letter asking that he not be included on the list and pointing out the serious impact such an action would have on his reputation, and current and future employment. See Ex. 1 (attached).

Former and Current Officers, Directors, and Senior Managers” is a public document. Read in conjunction with the June 6 Order, the list sets forth people that the Commission Staff, pursuant to the Commission’s Order, has labeled “potential wrongdoers.” And while placing this badge of opprobrium on Mr. Witsaman, the Order does not provide a method by which Mr. Witsaman’s name can be removed from the list. The Order must be amended to provide an adequate process for such removal.

The Due Process Clause of the Fifth Amendment forbids the government from arbitrary deprivations of liberty. Goss v. Lopez, 419 U.S. 565, 574 (1974). The Goss Court stated, “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the [due process] clause must be satisfied.” Id. (citing Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Board of Regents v. Roth, 408 U.S. 564, 573 (1972)); accord, Gilbert v. Homar, No. 96-651 (S. Ct. June 9, 1997).

Furthermore, the Due Process Clause ensures procedural safeguards before the government can disqualify any individual from eligibility to work with government agencies or thwart an individual’s right to follow a chosen trade or profession. See Kartseva v. Department of State, 37 F.3d 1524 (D.C. Cir. 1994). In Kartseva, the plaintiff was fired from her job working as an interpreter for a private company that contracted with the State Department. The State Department found the plaintiff ineligible to work on State Department projects which resulted in the company firing the plaintiff. The D.C. Circuit held that the Fifth Amendment protects individuals from government action that changes an individual’s status and results in a disqualification from future government work or precludes an individual from following a chosen trade or profession. Id. at 1528-29.

By including Mr. Witsaman on the list, the Commission has both affected his current employment status and interfered with his ability to follow his chosen

profession. Having caused these harms to Mr. Witsaman, the Order fails to provide Mr. Witsaman a method for resolution of this issue.

First, under the terms of the Order as now written, MobileMedia may be required to terminate Mr. Witsaman to achieve Second Thursday relief. See Order at ¶17 (“former and current officers, directors and senior managers . . . will have no role in the future operation and management of the company”).<sup>4</sup> Consistent with the Due Process Clause, the Commission may not require the termination of an employee without a showing of wrongdoing.

Second, the Order directs all the FCC Bureaus and Offices not to grant any radio applications in which individuals on the list have “attributable interests . . . without resolution of this issue as it pertains to that individual, either in the context of this hearing, if Second Thursday relief is ultimately not granted, or in the context of another specific application.” See Order at ¶18. If MobileMedia is required to terminate Mr. Witsaman pursuant to the terms of the Order, there will be no independent method by which he may resolve this issue before the Commission. Furthermore, other telecommunication companies with applications pending before the Commission would be reluctant to hire Mr. Witsaman, lest they too be subject to the hearing requirements of the Order. Mr. Witsaman’s ability to resolve this issue “in the context of another specific application” would then also not be available.

Mr. Witsaman urges the Commission to reconsider and/or clarify the June 6 Order, or to grant other appropriate relief. The Order sweeps too broadly in creating a class of “potential wrongdoers,” defined merely by the individual’s position at the company. And having created such a broad class, the Order must provide a mechanism by which Mr. Witsaman’s name can be removed from the list. Otherwise, the

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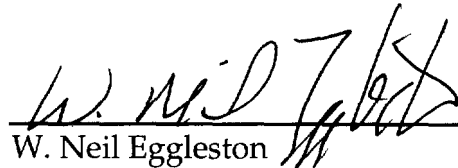
<sup>4</sup> To the extent that this provision is read to bar the future employment at MobileMedia of all former and current officers, directors and senior management regardless of any determination of wrongdoing, this provision must also be modified.

Commission will have substantially harmed Mr. Witsaman without granting necessary due process protections.

### CONCLUSION

For the foregoing reasons, Mr. Witsaman's Motion for Reconsideration and/or Clarification of Paragraphs 17 and 18 of the Commission's June 6, 1997 Order, Or, In The Alternative, For Other Relief should be granted.

Respectfully submitted,



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W. Neil Eggleston  
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1299 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
(202) 783-0800

Attorneys for  
Mark L. Witsaman

Dated: July 7, 1997

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion Of Mark L. Witsaman For Reconsideration And/Or Clarification Of Paragraphs 17 And 18 Of The Commission's June 6, 1997 Order Or, In The Alternative, For Other Relief were served by hand and/or regular United States mail, postage prepaid, this 7th day of July, 1997, upon each of the parties listed below:

The Honorable Reed E. Hundt\*  
Federal Communications Commission  
1919 M Street, N.W.  
Room 814  
Washington, D.C. 20554

The Honorable Rachelle B. Chong\*  
Federal Communications Commission  
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The Honorable James H. Quello\*  
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The Honorable Joseph Chachkin\*  
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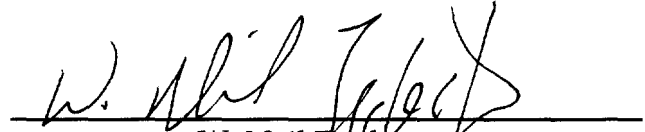
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W. Neil Eggleston



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# HOWREY & SIMON

June 16, 1997

W. Ned Eggleston

## BY FACSIMILE AND HAND DELIVERY

Gary P. Schonman, Esq.  
Enforcement Division  
Federal Communications Commission  
2025 M Street, N.W., Suite 5002  
Washington, D.C. 20554

Re: MobileMedia Corporation/Docket No. 97-115

Dear Mr. Schonman:

We understand that the Wireless Telecommunications Bureau is currently compiling a list of former and current MobileMedia officers, directors and senior managers pursuant to an Order of the Federal Communications Commission. The Commission directed the preparation of such a list in connection with ordering a stay in the above referenced proceeding under the Second Thursday doctrine. MobileMedia Corp., FCC 97-197 (June 5, 1997). We represent one or more current employees of MobileMedia who may be under consideration for inclusion on the list.

We are quite concerned that the inclusion of the names of any of our clients on the list will have a detrimental effect on their reputations, and current and future employment. As a result, we urge the Bureau not to include the names of any of our clients. If despite this request the Bureau insists on including the names of one or more of our clients on such a list, we have the following additional comments.

First, we urge that the list be entitled simply List of Current and Former Officers and Directors of Mobilecomm. Thus, we believe that the list should not suggest that the named individuals are potential, accused, or actual wrongdoers. Although the Commission may believe the list it has ordered would include "potential wrongdoers" (*id.*), the list must make clear on its face that all persons do not carry the badge of wrongdoing.

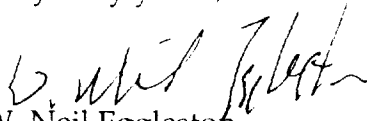
Any attempt by the Bureau to suggest that the individuals on this list are "wrongdoers" would not only contradict the Commission's Order, but would also violate our clients' rights to due process under the Fifth Amendment of the Constitution. The due process clause forbids arbitrary deprivation of liberty. Goss v.

Lopez, 419 U.S. 565, 574 (1974). The Goss Court stated, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the [due process] clause must be satisfied." Id. (citing Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Board of Regents v. Roth, 408 U.S. 564, 573 (1972)); accord, Gilbert v. Homar, No. 96-651 (S. Ct. June 9, 1997); Kartseva v. Department of State, 37 F.3d 1524 (D.C. Cir. 1994).

Second, given the context in which this list is being prepared, we are concerned that even a properly-captioned list will carry with it explicit or implicit finding by the Commission that the people on the list have engaged in wrongdoing. A suggestion by the government that individuals on this list engaged in wrongdoing may result in these individuals losing their present positions with MobileMedia and may also impair their ability to find alternative employment in this industry.

Finally, it is our understanding that any list generated by the Bureau will not be made public. If the Bureau intends to publish this list, the due process implications discussed in this letter would be further exacerbated, and the monetary harm to the individuals could be substantial.

Very truly yours,

  
W. Neil Eggleston

cc: Richard Gordin, Esq.  
Wiley, Rein & Fielding